Supreme Court, U.S.
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No. 90-1521

In the Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL COIRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington. D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the version of 18 U.S.C. 1510(a) in effect at the time of petitioner's crimes applied to petitioner's efforts to cause his co-conspirators to misrepresent facts to a criminal investigator.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 922 F.2d 1008.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1991. The petition for a writ of certiorari was filed on April 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiring to violate the Racketeer Influenced and

Corrupt Organizations Act (RICO), in violation of 18 U.S.C. 1962(d); conspiring to obstruct justice and to obstruct a criminal investigation, in violation of 18 U.S.C. 371; two counts of obstructing a criminal investigation, in violation of the now-superseded 18 U.S.C. 1510(a) (1976); and two counts of obstructing a grand jury investigation, in violation of 18 U.S.C. 1503. The district court sentenced petitioner to 15 years' imprisonment and a $25,000 fine for the RICO conspiracy offense, and to concurrent terms of five years' imprisonment on each of the remaining counts. The court of appeals found that the obstruction of criminal investigation counts were multiplicitous and thus ordered the district court to vacate petitioner's conviction on one of those counts, but it affirmed the district court's judgment in all other respects.

1. Petitioner was a criminal defense attorney active in a narcotics enterprise that involved Angelo Ruggiero, Gene Gotti, and John Carneglia. The count challenged by petitioner arises out the death of Salvatore Ruggiero, the brother of Angelo Ruggiero. Salvatore, who since 1975 had been a fugitive facing narcotics and tax evasion charges, died in a plane crash on May 6, 1982. Promptly after the crash the Federal Aviation Administration notified Alfred Dellentash, the co-owner of the airplane. After hearing the news, Dellentash and his associate, Wayne Debany, drove to Salvatore's house in New Jersey, where they met Carneglia, Gotti, and Salvatore's brother Angelo, and told them of Salvatore's death. Pet. App. 3a-4a, 8a.

The FBI and a grand jury began an investigation into Salvatore's activities, including the possibility that other individuals may have been harboring him. Because Angelo had been in continuous contact with Salvatore for the previous several years, he was concerned that he might be charged with harboring a fugitive. The next day, Dellentash and Debany met at Angelo's home with Carneglia, Gotti, and petitioner to discuss Angelo's concern that the

FBI would contact them to inquire how Angelo became aware of his brother's death. After rejecting several alternatives as unsuitable, petitioner finally approved the false story that Dellentash and Debany were to tell the FBI. The investigators would be told that, when Dellentash and Debany learned from the FAA that Salvatore had died, they went to Salvatore's home, where they discovered an envelope marked "In case of emergency," containing the address and phone number of his parents. They would say that Debany went to Salvatore's parents' house and told them of their son's death, and that Angelo learned of the death from his parents. The day after the story was concocted, Dellentash told it in part to an FBI agent who was investigating the possible harboring of Salvatore and events in the wake of his death. Pet. App. 8a-9a.

Petitioner was indicted and convicted on two counts of violating 18 U.S.C. 1510(a) (1976) for his participation in concocting the false story that Debany and Dellentash told the FBI investigators.

2. On appeal, petitioner argued that the obstruction of investigation counts failed to allege an offense under 18 U.S.C. 1510(a) (1976) because the statute did not apply to a person who endeavors to cause an accomplice to lie to an investigator without himself lying to the accomplice. Pet. App. 12a.[1] The court of appeals rejected that argument, relying on its decision in *United States* v. *St. Clair*, 552 F.2d 57, 58 (2d Cir.), cert. denied, 433 U.S. 909 (1977), which held that the version of Section 1510(a) at issue is violated "whenever an individual induces or attempts to induce another person to make a material misrepresentation to a criminal investigator." Pet. App. 12a. The court acknowledged that petitioner's argument drew support from

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[1] Although this argument was not raised in the district court, the court of appeals addressed it under the plain error doctrine. Pet. App. 11a.

the Fifth Circuit's holding in *United States* v. *Cameron*, 460 F.2d 1394, 1400-1402 (1972), but confirmed that *St. Clair* had rejected the analysis set forth in *Cameron*. Pet. App. 13a.[2]

ARGUMENT

Petitioner's sole claim (Pet. 4) is that the version of Section 1510(a) involved in this case is directed only at harm to witnesses, and thus applies only in circumstances where the witness is the object of the misrepresentation proscribed by Section 1510(a); in petitioner's view, the statute does not apply where the defendant collaborates with the witness to cause the witness to use misrepresentation to obstruct an investigation. Because Section 1510 was substantially amended in 1982, this issue has no continuing significance and does not merit the attention of this Court. In any event, the decision below is correct.

1. At the time of petitioner's offense, in May 1982, Section 1510(a) provided:

> Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats

[2] Petitioner raised numerous other arguments on appeal, all but one of which the court of appeals rejected. The court accepted petitioner's argument that the two obstruction of investigation counts were multiplicitous and ordered the district court to vacate the conviction on one of those counts. Pet. App. 13a-17a.

Because the case will return to the district court for modification of the judgment, the case is not final in all respects. This does not affect the jurisdiction of this Court. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 2.2 (6th ed. 1986). Although we generally believe that this Court should await final judgments before reviewing criminal convictions, the lack of finality should not be dispositive in the limited circumstances presented here, because the proceedings remaining in the district court are only ministerial and will not affect the issue presented by the petition. Cf. *Pope* v. *Atlantic Coast Line R.R.*, 345 U.S. 379, 382 (1953) (expressing a similar view in a case seeking review of the judgment of a state court).

> thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator
>
> * * * * *
>
> Shall be fined not more than $5,000, or imprisoned not more than five years, or both.

On October 12, 1982, Section 1510(a) was amended to eliminate the phrase "misrepresentation, intimidation, or force or threats thereof." See Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 4(e), 96 Stat. 1253.[3] Accordingly, petitioner's conduct would not be punishable under the current version of Section 1510(a); the sole remaining *actus reus* is bribery. Because there is no reason to expect any more cases addressing the meaning of the term "misrepresentation" in the pre-1982 version of Section 1510, there is no need for this Court to review the issue here.

2. In any event, the decision of the court of appeals is correct. In *United States* v. *Russell*, 255 U.S. 138 (1921), this Court interpreted the term "endeavor" in a predecessor obstruction-of-justice statute to encompass "any effort or essay to accomplish the evil purpose that the section was enacted to prevent." *Id.* at 143. The evidence in this case

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[3] The amending statute created a new Section 1512(b) (subsequently amended by Pub. L. No. 99-646, § 61, 100 Stat. 3614), which punishes any person who

> knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—
>
> * * * * *
>
> (3) hinder, delay, or prevent the communication to a law enforcement officer * * * of the United States of information relating to the commission or possible commission of a Federal offense * * *.

The prohibition against "corruptly persuad[ing] another person" would appear to apply to conduct such as the conduct involved in this case.

showed that petitioner endeavored to use misrepresentation to obstruct the communication of information to the FBI when he induced his confederate to tell a false story to the FBI. Nothing on the face of the statute supports petitioner's argument that the statute does not apply when the misrepresentation is to be made by the witness, but not to the witness.

As the Second Circuit recognized in *St. Clair*, 552 F.2d at 58-59, the House Report supports this interpretation of the statute:

> Your committee wishes to make abundantly clear the meaning of the term "misrepresentation" as used in this act. It is our intention that the actual procurement by a party of another party's misrepresentation or silence to a Federal investigator would be covered even though such procurement was not achieved by any misrepresentation. At the same time, it is also our intention that procurement of a witness' communication or silence to a Federal investigator by means of a misrepresentation on the part of the procurer is also covered by the act.

H.R. Rep. No. 658, 90th Cong., 1st Sess. 3 (1967). The contrary reasoning of the *Cameron* court rested on another passage of the legislative history, which suggested that the primary goal of Section 1510(a) was to prevent intimidation of witnesses by the objects of criminal investigations. 460 F.2d at 1401. But a reference in the legislative history to one object of a statute cannot bar application of the statute to other objects that fall within the plain reach of the statute's language. "An example, after all, is just that: an illustration of a statute's operation in practice. It is not * * * a definitive interpretation of a statute's scope." *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 110 S. Ct. 2668, 2677 (1990). That is especially true here, where the legislative

history also specifically approves the object in dispute.[4] Accordingly, we believe that the court of appeals correctly upheld application of the former version of Section 1510(a) to petitioner's successful effort to cause his confederates to lie to federal criminal investigators, and correctly rejected the reasoning of the Fifth Circuit in *Cameron*. See *United States* v. *Fitterer*, 710 F.2d 1328, 1330-1331 (8th Cir.) (following *St. Clair*), cert. denied, 464 U.S. 852 (1983).

3. Although we agree that the decision below conflicts with the Fifth Circuit's decision in *Cameron*, we do not accept petitioner's additional claim that decisions of the Sixth, Eighth, and Ninth Circuits have followed *Cameron* in conflict with the analysis of the Second Circuit here. See Pet. 5 (citing *United States* v. *Scruggs*, 549 F.2d 1097, 1106-1107 (6th Cir.), cert. denied, 434 U.S. 824 (1977); *United States* v. *Pecina*, 501 F.2d 536, 539-540 (8th Cir.), cert. denied, 419 U.S. 1072 (1974); *United States* v. *Lester*, 749 F.2d 1288, 1298-1299 (9th Cir. 1984)). Each of the cited cases did cite *Cameron*, but each went on to distinguish *Cameron* and affirm the conviction under review.[5] Thus, no court has rejected the analysis of the Second Circuit that was followed here, and no court has followed the analysis of the Fifth Circuit to decide a case in a way that conflicts with the rule followed by the Second and Eighth Circuits.

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[4] We note that the court of appeals in *Cameron* did not address, and apparently was unaware of, the legislative history on which the Second Circuit relied in *St. Clair*.

[5] Nor is petitioner correct to suggest (Pet. 5) that he can draw support from *United States* v. *Fineman*, 434 F. Supp. 189, 195-196 (E.D. Pa. 1977), aff'd without opinion, 571 F.2d 572 (3d Cir.) (Table), cert. denied, 436 U.S. 945 (1978). That court discussed obstruction of justice in the RICO context, and did not invalidate the Section 1510 charges against the defendant in that case. See 434 F. Supp. at 196. Moreover, the court's discussion cites neither *Cameron* nor any other case, and thus contributes little to the analysis of the issue presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney

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